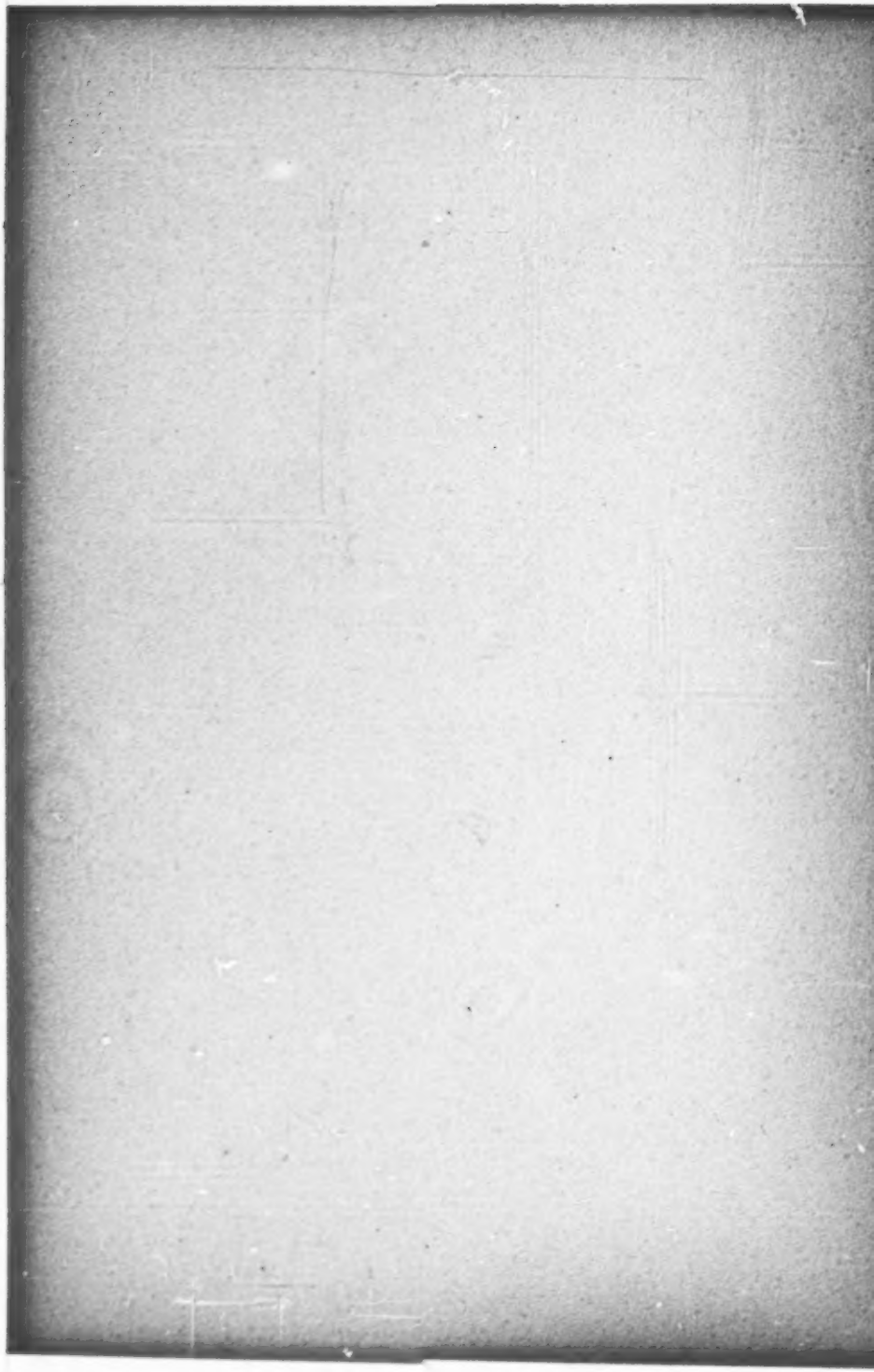

No. 74-1174

APR 16 1975

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

AIR LINE DISPATCHERS' ASSOCIATION, *et al.*,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AIRLINE RESPONDENTS IN OPPOSITION

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April 16, 1975

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BRIEF OF AIRLINE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming a Civil Aeronautics Board decision approving agreements among airlines establishing an organization to coordinate their separate collective bargaining negotiations.

STATEMENT

Petitioners seek review of a Judgment of the Court of Appeals affirming *per curiam* a unanimous decision of the Civil Aeronautics Board which approved two agreements among certificated air carriers establishing the Airlines Industrial Relations Conference ("AIR Conference").[1]

AIR Conference is an industrial relations organization designed to provide information and services to member carriers in connection with their collective bargaining activities and related matters. A principal purpose of the organization is to coordinate the collective bargaining conducted separately by individual member carriers in negotiations with national labor unions representing employees of many different carriers at the same time. A premise underlying the formation of AIR Conference was that the airlines had been disadvantaged in collective bargaining by their lack of coordination in dealing with centralized multi-carrier unions, and that this disadvantage has contributed to the great success of airline labor unions at the bargaining table over the years.[2]

The AIR Conference agreements contemplate coordination of bargaining through discussion of issues

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[1] The agreements are the Agreement to Establish AIR Conference (Appendix D pp. 94a-97a) and the Articles of Association of AIR Conference (Appendix D pp. 98a-109a), as modified by Amendments effective July 22, 1973 (Appendix H). At present, 21 carriers are members of AIR Conference: Air New England, Alaska, Aloha, American, Continental, Eastern, Flying Tiger, Frontier, Hawaiian, Hughes Airwest, National, North Central, Northwest, Ozark, Piedmont, Reeve Aleutian, Texas International, Trans World, United, Western, and Wien Air Alaska.

[2] The record shows that airline wage rates are higher than and have been rising faster than those of any other non-seasonal industry. (JAE 581, 583, 584, 586-8).

and strategies and by the free exchange of pertinent information among the members. The agreements also authorize the Conference to act as a bargaining agent in a particular negotiation for one or more member carriers, at the carrier's request, pursuant to a power of attorney executed by the represented carrier for the negotiation in question. As originally drafted, the agreements provided that such a power of attorney, once executed and accepted by AIR Conference, could not be revoked until the negotiation to which it applied had been concluded, and they also provided for damages to carriers injured by a prohibited revocation. These provisions for irrevocability enforced by damages were eliminated after the Board concluded that they should not be approved because they could permit AIR Conference to refuse a settlement which a carrier wished to accept and because the carrier might thereby be prevented from fulfilling its obligation under the Railway Labor Act to exert every reasonable effort to reach agreement. (Appendix C, pp. 34a-43a). Under the agreements as modified, a carrier represented by AIR Conference in a negotiation may dismiss the Conference as bargaining agent at any time, and AIR Conference has no authority to dictate the collective bargaining policies or practices of any carrier.

The AIR Conference agreements were submitted to the CAB pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. § 1382(a), which requires filing of all agreements among air carriers involving "cooperative working arrangements" affecting air transportation. Under Section 412, the Board is required to approve any agreement submitted thereunder which it does not find to be adverse to the public interest or in violation of the Federal Aviation Act (which provides

inter alia that certificated air carriers must comply with the provisions of the Railway Labor Act, 49 U.S.C. § 1371(k)(4)). In approving the Conference agreements over union opposition, the Board adopted the findings and conclusions of its Administrative Law Judge that the agreements as modified did not violate any law and had no consequences adverse to the public interest. (Appendix B.)

After full briefing and oral argument in the Court of Appeals, that Court (per Wright, Robb, and Second Circuit Senior Judge Moore) unanimously affirmed the Board's order *per curiam,* concluding that the factual findings were supported by substantial evidence in the record and the legal conclusions were free from reversible error. (Appendix A). The instant Petition is brought by one group among the several union parties who opposed approval of AIR Conference before the Board. [3]

REASONS FOR DENYING THE WRIT

The Petition does not advance any reason why Supreme Court review should be warranted for the Court of Appeals' *per curiam* affirmance of a routine CAB regulatory order. There is no conflict with any decision of this Court and no conflict among the Circuits, which are unanimous that coordination of separate bargaining activities through a common bargaining agent is consistent with the principles of the labor regulatory statutes. No far-reaching question of statu-

[3] The Air Line Pilots Association, which was a party to the petition for review in The Court of Appeals, has not sought certiorari. The Teamsters and the jointly represented Allied Pilots Association and Aircraft Mechanics Fraternal Association did not appeal the Board's ruling after the provisions for an irrevocable power of attorney enforced by damages were eliminated.

tory interpretation is presented, but only a question of the application of well-understood statutory principles to particular facts, and on that question the Petition does not cite any judicial authority at all.[4] The Petition contains nothing to suggest that the issues it raises are otherwise important or controversial.

The only questions raised in the Petition are those concerning the legality under the Railway Labor Act of the authority given to AIR Conference to act as a bargaining agent for one or more member carriers on request—an authority which AIR Conference has in fact never used in four years of operation and which according to the testimony of the Conference's responsible officials is not intended to be employed frequently, if at all. In its judgment of affirmance the Court of Appeals concluded that "the issues presented occasion no need for an opinion . . . ." (Appendix A p. 2a). *A fortiori,* the limited issues presented in the Petition occasion no need for review in this Court.

The express terms of the Railway Labor Act make clear that carriers are entitled as a matter of right to be represented by a common bargaining agent if they choose. A recited purpose of the Act is to protect the

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[4] The only judicial authority cited in the Petition is Chicago & N.W. Ry. v. United Transportation Union, 402 U.S. 570 (1971), supporting the general propositions that Section 2, First of the Railway Labor Act is the "heart" of the Act and that parallels between the National Labor Relations Act and the Railway Labor Act should be drawn "with caution," and Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 127 U.S. App. D.C. 298, 383 F.2d 225 (1967), *cert. denied,* 389 U.S. 1047 (1968), also cited for the latter proposition. There is no claim that the holdings of these cases are pertinent to any issue raised in the Petition. The only other decisional authority cited is a prior decision of the CAB rejecting the very same legal contentions made in the Petition. Airlines Negotiating Conference, 8 C.A.B. 354 (1947).

freedom of both carriers and employees to organize themselves for collective bargaining as they wish without interference. 45 U.S.C. § 151a and 152, Third. The bargaining representative selected pursuant to this right of self-organization may be an "organization . . . designated either by a carrier or [by a] group of carriers." 45 U.S.C. § 151, Sixth. These provisions preclude the contentions advanced in the Petition that the designation of a common bargaining agent is in itself inconsistent with the statutory scheme of the Act. (Petition pp. 8-10). Moreover, the Board found that the evidence did not support the premise on which Petitioners rely—that AIR Conference would represent the interests of "some third party" (Petition p. 9) rather than those of the individual carriers represented. (Appendix C pp. 45a-46a). In view of the right of each carrier to terminate any bargaining authority given to AIR Conference whenever the carrier concludes that its interests are not being served, this finding is beyond dispute; and the Petition disputes it by nothing more than a reiteration of the assertions found insupportable by the Board.

The Courts of Appeals have uniformly held under the National Labor Relations Act that coordination of bargaining positions among members of separate bargaining units through a common bargaining agent does not unlawfully convert separate bargaining units into a multi-employer unit or otherwise violate the duty of good faith bargaining imposed by that Act. *General Electric Co.* v. *NLRB,* 412 F.2d 512 (2d Cir. 1969); *Minnesota Mining & Mfg. Co.* v. *NLRB,* 415 F.2d 174 (8th Cir. 1969); *Standard Oil Co.* v. *NLRB,* 322 F.2d 40 (6th Cir. 1963); *see also American Radiator and Standard Sanitary Corp.* v. *NLRB,* 381 F.2d 632 (6th

Cir. 1967). These cases follow the lead of the CAB, which first considered the parallel question under Section 2, *First* of the Railway Labor Act in 1947 in approving the establishment of an airline bargaining organization indistinguishable for these purposes from AIR Conference. *Airlines Negotiating Conference,* 8 C.A.B. 354 (1947). Accordingly, there is no support for the Petition's contention that the designation of AIR Conference as a common bargaining agent would unlawfully impose multi-employer bargaining without the unions' consent. (Petition pp. 10-12). Moreover, the Board found, contrary to the thesis of the Petition, that AIR Conference does not seek to impose unconsented multi-employer bargaining (Appendix C, p. 51a), and the evidence shows that it does not even seek identical settlements for different carriers and does not now contemplate bargaining for many, if any, members. (JAE 53-55, 68, 70-74, 94-95, 124-25).

All of the Petition's arguments rest on the bare assertion that, as a common bargaining agent, AIR Conference would take a "uniform position" for all carriers it represents and would then "stand firmly by it," thereby allegedly violating the statutory duty under Section 2, *First* of the Act, 45 U.S.C. § 152, to "exert every reasonable effort to make and maintain agreements. . . ." (Petition, pp. 9, 11, 14). On the basis of this speculation, the Petition contends in effect that the mere establishment of AIR Conference with authority to act as a bargaining agent if requested is *per se* a violation of the Act. The Board found no support in the evidence for such speculation as to the manner in which AIR Conference might conduct itself in bargaining. (*See* Appendix C pp. 48a-50a, 51a-53a). And if there were any such basis, the law is clear that

except in extreme cases violations of the subjective duty imposed by Section 2, *First* are to be determined only upon analysis of particular conduct in an actual negotiation, not on a predictive, *per se* basis. *Kennedy* v. *Long Island R.R.*, 319 F.2d 366 (2d Cir.) *cert. denied*, 375 U.S. 830 (1963); *Piedmont Aviation Inc.* v. *ALPA*, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970); *see also NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 508-510 (1960) (opinion of Mr. Justice Frankfurter).

The Petition appears to allege that the availability of protection against a portion of the revenues lost as a result of strikes which is provided to the 14 of the 21 AIR Conference members who are also members of the Mutual Aid Agreement furnishes a basis for concluding that AIR Conference as a negotiator would not seek to reach agreements. (Petition, pp. 13-14). The contentions that Mutual Aid permits recipients to profit from a strike, removes incentives to avoid strikes, or causes carriers to incur or prolong strikes were recently considered and rejected by the CAB in *Airlines Mutual Aid Agreement*, C.A.B. Order No. 73-2-110 (Feb. 27, 1973), *aff'd* — U.S. App. D.C. —, 502 F.2d 453 (1974), *cert. denied*, 43 USLW 3430 (1975) They were rejected once again in the present case (Appendix C pp. 48a-50a). The effect of Mutual Aid is no different when the carrier is represented by AIR Conference than when it is not.

CONCLUSION

For the foregoing reasons, the Petition for Writ of certiorari should be denied.

Respectfully submitted,

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